575-576, 583-584.) In 1946 he deducted a loss of $533.88 which he had taken in 1945 (R. 574).

ARGUMENT

1. Petitioner urges that proof of the wilful filing of a false and fraudulent income tax return cannot, without more, sustain his conviction under Section 145(b) of the Internal Revenue Code, *supra,* pp. 2-3 (Br. 27-40). He contends that, at most, such proof would support conviction under either Section 145(c), *supra,* p. 3, or Section 3616(a) *supra,* p. 3, of that Code (both lesser offenses). Petitioner's argument rests on a misconception of this Court's opinion in *Spies* v. *United States,* 317 U.S. 492. It is not only without merit but it is, in addition, the same contention as that rejected by the Third Circuit in *United States* v. *Croessant,* 178 F. 2d 96, certiorari denied, 339 U. S. 927 which decision this Court only recently refused to review, and *United States* v. *Pannell,* 178 F. 2d 98, certiorari dismissed on motion of counsel for Pannell, 339 U.S. 927.

The *Spies* case does not require that in every Section 145 (b) prosecution there be proof of concealment of income in the conduct of the taxpayer's business or financial affairs, nor does it require that in a tax evasion case the willful attempt to evade and defeat the tax be constituted by an affirmative act *other* than the knowing filing of a false and fraudulent return.

Spies was a no-return case in which the Government based its charge of willfully attempted

evasion upon the defendant's failure to file. The Court held that this omission, i. e. the non-observance of the statutory duty to make a return (defined as a misdemeanor under Section 145 (a) of the Code), could not constitute the affirmative action contemplated by the use of the term "attempt" in Section 145 (b). 317 U. S., at 499. By way of illustration only, the Court enumerated certain acts from which "affirmative willful attempt may be inferred," even in a case in which there is "default in filing the return and paying the tax" (pp. 499-500). That the list did not include the act of filing a false and fraudulent return cannot avail petitioner, since it is obvious that such an affirmative act would not be pertinent to a case involving no return at all. On the contrary, it is clear that this Court did not intend to foreclose consideration, in a case in which a return is made, of the filing of a false and fraudulent return as a means of attempted evasion. The Court not only warned (p. 499):

> Congress did not define or limit the methods by which a willful attempt to defeat and evade might be accomplished and perhaps did not define lest its effort to do so result in some unexpected limitation. Nor would we by definition constrict the scope of the Congressional provision that it may be accomplished "in any manner."

but it specifically announced that "affirmative willful attempt may be inferred from * * * *any*

conduct, the likely effect of which would be to mislead or to conceal" (italics supplied).

Nor is the court below in conflict with the Fifth Circuit. In *Jones* v. *United States,* 164 F. 2d 398 (C. A. 5), the conviction was reversed because the trial court, in addition to other serious errors, had apparently instructed the jury that a knowing failure to return the taxpayer's full income was sufficient, in itself, for conviction under Section 145 (b). Here, on the other hand, the trial judge expressly charged the jury that in order to find that petitioner had wilfully attempted to evade and defeat his tax, they must find that the errors made in his tax returns were wilfully made by him "with knowledge, and with the purpose to do wrong" (R. 676), that "he had a wicked intent and was knowingly cheating the Government," and that he "acted with a bad motive, intending to defeat or evade the income tax" (R. 679). Furthermore, if the *Jones* opinion ever created any doubt as to how the Court of Appeals for the Fifth Circuit had read the *Spies* decision, the Fifth Circuit has decisively negatived any conflict with the court below by its later decision in *Barrow* v. *United States,* 171 F. 2d 286, which is in square accord with the instant holding. The Eighth Circuit also appears to be in agreement. *Cave* v. *United States,* 159 F. 2d 464, 466-467, certiorari denied, 331 U. S. 847; *Myres* v. *United States,* 174 F. 2d 329, certiorari denied, 338 U. S. 849; cf. *Kirsch* v. *United States,* 174 F. 2d 595 (C. A. 8).

Identical contentions, based on substantially the same arguments, i.e., that the case of *Spies* v. *United States,* 317 U. S. 492, prohibits conviction on such proof, were rejected by the Third Circuit in *United States* v. *Croessant,* 178 F. 2d 96, certiorari denied, 339 U. S. 927, and *United States* v. *Pannell,* 178 F. 2d 98, certiorari dismissed on motion of counsel for Pannell, 339 U. S. 927. The Court is respectfully referred to our brief in opposition (Point I, pp. 7-10) in the *Croessant* case (No. 591, O.T. 1949) for our answer to the arguments made in those cases.

It may be assumed, for present purposes, that the evidence in this case would have supported convictions for the lesser offenses, dealing with false returns, established by Section 145 (c) and Section 3616 (a) of the Internal Revenue Code. It does not follow, of course, that these facts cannot also sustain a conviction under Section 145 (b), nor that prosecution must be had only under the narrower provisions. See *Taylor* v. *United States,* 179 F. 2d 640 (C.A. 9), rejecting contentions similar to those advanced here.

2. Petitioner also urges (Br. 40-47) that the wilful filing of a false and fraudulent income tax return was not an offense under Section 35(A) of the Criminal Code, *supra,* p. 4 [2], as charged in count 5 of the indictment, basing his argument on the ground that Section 35(A) of the Criminal

[2] Now codified as 18 U.S.C. 1001.

Code was impliedly repealed *pro tanto* by the enactment of Section 145(c) of the Internal Revenue Code, *supra*, p. 3. This contention is clearly without merit. As stated by the court below, even if there was a miscitation of the statute in count 5 of the indictment, petitioner's defense was not prejudiced thereby. In any event, the question does not appear to be open for consideration here.

The court below, on petitioner's contention that counts 3 and 5 alleged one and the same offense, struck the $2,000 fine from the sentence received by petitioner under count 5 (R. 901). This resulted in petitioner's receiving concurrent two-year prison sentences on counts 3 and 5 and a fine of $2,000 on count 3 only. Consequently, it is now immaterial whether the conviction under count 5 rested on Section 35(A) of the Criminal Code or on Section 145(c) of the Internal Revenue Code. Since the prison sentence imposed on petitioner on count 5 does not exceed and is concurrent with the prison sentence he received on count 3, under which he was validly convicted for violation of Section 145(b) of the Internal Revenue Code, he could not be injured by the imposition of the prison sentence on count 5. Hence, there is no necessity for considering the question raised by this contention of petitioner. *Hirabayshi* v. *United States*, ~~328 U. S. 640, 642~~ 320 U.S. 81, 85; Pinkerton v. United States, 328 U.S. 640, 642

3. Petitioner's contention that the trial judge failed to give proper instructions to the jury con-

cerning specific transactions relating to his income, is without substance. The trial judge gave full and correct instructions covering the elements of the offenses charged in the indictment (R. 672-686). As to the specific transactions giving rise to the alleged understatement of net income, the trial court properly left it to the jury to determine whether they were bona fide or fictitious. Under instructions given by the court, the jury might have determined that the transactions were either bona fide or were believed to be bona fide by the petitioner. The verdict of guilty necessarily establishes that the jury did not so believe.

The evidence adduced in this case was sufficient to sustain the verdict of guilty. The Government proved the filing of factually false returns reflecting substantial understatement of net income. From these facts and the surrounding circumstances the jury could properly infer wilfulness on the part of petitioner. *Spies* v. *United States, supra,* at pages 499-500.

CONCLUSION

The decision of the court below is plainly correct and there are no conflicts of decision. The petition for a writ of certiorari should, therefore, be denied.

Respectfully submitted.

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OCTOBER TERM, 1950.

No. 397.

ALFRED C. GAUNT, *Petitioner*,

v.

UNITED STATES OF AMERICA, *Respondent*.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit.

REPLY TO BRIEF FOR THE UNITED STATES IN OPPOSITION.

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